STEPHEN JUPP
BA(Hons), LLM, MRTPI

CHARTERED TOWN PLANNER

Planning and Building Control Division
Chichester District Council
East Pallant House
Chichester
PO19 1TY

Thursday, 30 November 2023

Dear Sir/Madam:

Re: Prior Approval Notification – Part 20, Class MA

Unit 15, Sherrington Mews, Selsey

I have pleasure in enclosing the above prior approval notification which seeks to change the empty office unit at 15 Sherrington Mews, Selsey to a dwelling, under the provisions of Part 20, Class MA.

Is there a Condition which Prohibits the use of Class MA?

Before I undertake an analysis of the relevant provisions of Class MA, it is first necessary to consider the circumstances in which a condition attached to a planning permission may preclude the operation of section 55(2)(f) of the 1990 Act and Article 3(1) of the Use Classes Order and/or Article 3(1) and Part 3 of the Second Schedule to the General Permitted Development Order – in other words, the right to use the land or building in question for other purposes within the same Use Class and/or to make any of the changes of use that are (or would otherwise be) Permitted Development.

It would appear that the Sherrington Mews development originally formed part of a much larger mixed use development scheme including housing, business and open space as well as a new distributor road for which outline planning permission was granted under SY/00/00837/OUT on 28 August 2002.

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Condition 22 of the original outline permission states:

> *"The business premises shall be used only for the purposes (a) within Use Class B1 or (b) B8 as defined in the Town and Country Planning (Use Classes) Order, 1987."*

It is clear from this wording that the condition sought to control the nature of the commercial use to just offices within Use Class B1 or for storage purposes. It is very difficult to conclude that it should be seen as also removing all forms of permitted development.

Reserved Matters application SY/03/00947/REM was granted on 25 June 2003 for "*B1 step up units providing cheap basic space for a variety of small businesses to start or relocate from the Selsey area at Selsey Gate Enterprise Park*".

One of the Informatives on the formal decision notice draws the applicants attention to the conditions attached to outline planning permission reference SY/00/00837/OUT dated 28th August 2002.

Article 3(4) of the GPDO states that *'Nothing in this Order [the GPDO] permits development contrary to any condition imposed by any planning permission granted or deemed to be granted under Part 3 of the Act otherwise than by this Order.'* In other words, if there is an existing condition restricting the existing land or buildings in some way, as in this case, then the development being considered under the GPDO cannot be permitted.

In *Carpet Décor* the High Court found that a planning condition excluding permitted development rights would have to be in 'unequivocal terms' in order to implicitly restrict such rights.

Dunoon Developments, in discussing a condition that sought to limit [my emphasis] activities within a building, found that a condition can only exclude the operation of the GPDO by express reference to it and not by implication, but that careful reading of the condition in question is still necessary.

In the case of *Trump International* years later the judge found that the interpretation of words in a condition, being a public document, is an objective exercise that will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. In other words, whether a reasonable reader would understand what the words mean when reading the condition in the context of the other conditions and the consent as a whole.

More recently, the Court of Appeal (Patten and Hickinbottom LJJ) has delivered an important judgment in *Dunnett Investments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 192, upholding the judgment of Patterson J in the High Court. The judgment is the Court of Appeal's latest decision as how a condition should be construed, and also is only the second Court of Appeal case to consider *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85. It is also relevant in relation to Class MA prior approval applications in respect of conversion of office buildings into residential, and the nature of the type of words which restrict such conversions.

The appeal centred on the interpretation of a condition, which reads: *"The use of this building shall be for the purposes falling within Class B1 (Business) as defined in the*

Town and Country Planning (Use Classes) Order 1987, and for no other purpose whatsoever, without express planning consent from the Local Planning Authority first being obtained." The Appellant wished to use rights under the GPDO to change the use of a building from office to residential use. The local planning authority refused to grant a certificate of lawfulness to this effect, and an Inspector dismissed an appeal against this refusal.

The Inspector's decision was challenged before the High Court and then the Court of Appeal, on three grounds: i) The provisions of the GPDO constituted an express planning consent; ii) Alternatively, that the prior approval mechanism constituted an express planning consent; iii) The condition was insufficiently certain to exclude the application of the GPDO. The Court of Appeal rejected these submissions and dismissed the appeal. Taking Ground 3 first, the Court found that the intention of Parliament to grant a permitted development right (in this case, to change the use of B1 offices to residential) was subject to the ability of local planning authorities to exclude this. When the condition had been drafted this new PD right did not exist.

The Court applied the decision of the Supreme Court in Trump International and found the construction of the condition to be neither difficult nor unclear. The condition should be read as a whole.

The view of the Court of Appeal was summed up in this passage from the judgment of Hickinbottom LJ:

> *"Looking first at the words used, I do not consider the construction of the condition either difficult or unclear. Read straightforwardly and as a whole, as Patterson J found (notably at [43]-[44]), the natural and ordinary meaning of the words used is that the condition allows planning permission for other uses but restricted to that obtained upon application from the Council as local planning authority, and excludes planning permission granted by the Secretary of State by means of the GPDO. In particular, with due respect to Mr Katkowski's submissions to the contrary, in my view, "express planning consent from the Local Planning Authority" cannot sensibly include planning permission granted by the Secretary of State through the GPDO. It means what it says, i.e. planning permission granted by the local planning authority."*
>
> *In his view, the interpretation he favoured did not require the reading in, or reading out, of any words. On the other hand, the construction pressed by Mr Katkowski would take away all substance from the condition, leaving it entirely empty; the first part ("This use of this building shall be for purposes falling within Class B1 (Business) as defined in the Town and Country Planning (Use Classes) Order 1987…") merely reiterating the scope of the grant, no more than emphasised by the second part ("…and for no other purpose whatsoever…"), whilst the third part or tail ("…without express planning consent from the Local Planning Authority first being obtained") would be empty because it would include all means of granting planning permission whether by the planning authority or the Secretary of State. The condition would thus have no discernible purpose. It is a tenet of construction, falling within the umbrella of "sensible" interpretation as championed in Trump International, that it must have been the intention that a condition has some content and purpose. In context, this condition could not sensibly have been merely emphatic, which is all it would be if Mr Katkowski's submission were correct.*

Two clear points can be drawn from this Court of Appeal judgement in respect of when a condition will prohibit the use of permitted development rights for subsequent changes of use. Such changes of use are clearly prohibited in either of the following 2 situations:

1. The condition includes the words *"and for no other purpose"*, or

2. The condition includes the words to the effect of *"without express planning consent from the Local Planning Authority".*

Dunnett Investments was considering a prior approval application to change a building from a Class B1 (business) use to a dwellinghouse. The building had previously been granted planning permission to be a B1 use with a condition that stated the use could only be for a Class B1 use falling within the Use Classes order "and for no other purposes whatsoever without express planning consent from the Local Planning Authority first being obtained". The court found that the condition was clear and excluded the grant of planning permission by the GPDO because of the phrase "express consent of the Local Planning Authority". It also found that the second part of the condition, 'for no other purpose', on its own was sufficient to mean the operation of the GPDO and hence permitted development was prevented, otherwise what purpose would the wording have served.

In this case, I do not consider that the condition in question prevents the operation of the Order. It is clear to me that its wording merely restricts how the use should operate under the terms of the planning permission to which it has been attached. A grant of planning permission cannot in itself exclude the application of the Order. To do that, something more would be required which explicitly or implicitly restricts the operation of the Order.

I consider my findings to be consistent with the *Dunnett* Court of Appeal judgment as the condition before me contains no implicit or explicit provision to exclude the operation of the Order. I am satisfied that, when considering the condition objectionably and in a common sense way, it does not prevent development under Class MA.

I therefore conclude that the operation of the GPDO is not restricted by the existing planning condition of the 2000 permission. I can therefore turn to the particular requirement of Part 3, Class MA.

CLASS MA – COMMERCIAL, BUSINESS AND SERVICE USES TO DWELLINGHOUSES - REQUIREMENTS

Class MA makes clear that the following constitutes permitted development:

> *Development consisting of a change of use of a building and any land within its curtilage from a use falling within Class E (commercial, business and service) of Schedule 2 to the Use Classes Order to a use falling within Class C3 (dwellinghouses) of Schedule 1 to that Order.*

CLASS MA.1 REQUIREMENTS:

Class MA.1 sets out a number of scenarios and thresholds (a) — (m) whereby development is not permitted under this Part.

In order to assure the Council that the proposal is permitted development in this context, I have assessed the proposal against all of these criteria. In considering these criteria, I have had due regard to the latest version of Planning Policy Guidance that has been issued. I consider each of the relevant criteria in turn below.

In this regard the GPDO provisions make clear that Development is not permitted if:

(a) unless the building has been vacant for a continuous period of at least 3 months immediately prior to the date of the application for prior approval;

Comment: The letter attached to this statement from Byrne Commercial Property Ltd dated 29th November 2023 confirms that the property has been vacant for over 3 months preceding the date of their letter.

(b) unless the use of the building fell within one or more of the classes specified in sub- paragraph (2) for a continuous period of at least 2 years prior to the date of the application for prior approval;

Comment: Prior to becoming vacant the building had been a continuous for B1 purposes for a period in excess of two years, as confirmed in the letting agents letter attached.

(c) if the cumulative floor space of the existing building changing use under Class MA exceeds 1,500 square metres;

Comment: The cumulative floor space changing is very small and far below the 1500 sq m threshold.

(d) if land covered by, or within the curtilage of, the building—

(i) is or forms part of a site of special scientific interest;
(ii) is or forms part of a listed building or land within its curtilage;
(iii) is or forms part of a scheduled monument or land within its curtilage;
(iv) is or forms part of a safety hazard area; or
(v) is or forms part of a military explosives storage area;

Comment: None of these apply to the building and land.

(e) if the building is within—
(i) an area of outstanding natural beauty;
(ii) an area specified by the Secretary of State for the purposes of section 41(3) of the Wildlife and Countryside Act 198156;
(iii) the Broads;
(iv) a National Park; or
(v) a World Heritage Site;

Comment: The building is not within any of these areas.

(g) before 1 August 2022, if—

(i) the proposed development is of a description falling within Class O of this Part as that Class had effect immediately before 1st August 2021; and

(ii) the development would not have been permitted under Class O immediately before 1st August 2021 by virtue of the operation of a direction under article 4(1) of this Order which has not since been cancelled in accordance with the provisions of Schedule 3.

Comment: There is no direction under article 4(1) of this Order affecting the premises.

CONDITIONS

MA.2.—(1) Development under Class MA is permitted subject to the following conditions.

(2) Before beginning development under Class MA, the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to—

(a) transport impacts of the development, particularly to ensure safe site access;

Comment: Access onto and egress from the site is acceptable and meets current standards.

(b) contamination risks in relation to the building;

Comment: Being in use for B1(a) office purposes there are no contamination risks.

(c) flooding risks in relation to the building;

Comment: The site is within FZ1 and there are no flooding risks

(e) where—

(i) the building is located in a conservation area, and

(ii) the development involves a change of use of the whole or part of the ground

Comment: The site is not within a conservation area.

(f) the provision of adequate natural light in all habitable rooms of the dwellinghouses;

Comment: All habitable rooms will be provided with adequate natural light and this is clear from drawing 5.

(g) the impact on intended occupiers of the development of the introduction of residential use in an area the authority considers to be important for general or heavy industry, waste management, storage and distribution, or a mix of such uses;

Comment: This area is primarily used for office purposes with a small amount of storage and distribution. The storage and distribution uses, where they do exist, are low key in intensity of use due to the small size of the units concerned.

(h) where the development involves the loss of services provided by—

(i) a registered nursery, or

(ii) a health centre maintained under section 2 or 3 of the National Health Service Act 2006,

the impact on the local provision of the type of services lost; and

Comment: The development does not result in the loss of any of these services.

(i) where the development meets the fire risk condition, the fire safety impacts on the intended occupants of the building

Comment: MA.3. makes clear that development meets the fire risk condition referred to in paragraph MA.2(2)(i) if the development relates to a building which will— (a) contain two or more dwellinghouses; and (b) satisfy the height condition in paragraph (3), read with paragraph (7), of article 9A (fire statements) of the Town and Country Planning (Development Management Procedure) (England). Paragraph (3) has a height condition of 18m or 7 or more storeys. Accordingly, the building does NOT meet the fire risk condition and therefore (i) is not relevant.

PARAGRAPH W

Paragraph W(2)(ba) requires the application to be submitted by a statement specifying the net increase in dwellinghouses proposed by the development. In this case I can confirm that the net increase in dwellinghouses is 1.

Paragraph W(2)(bc) requires the application to accompanied with a floor plan indicating the total floor space in square metres; the dimensions and proposed use of each room; the position and dimensions of windows, doors and walls, and the elevations of the dwellinghouses. Drawing 5 is drawn to scale and that drawing provides all of these required details.

CONCLUSIONS.

There is no condition on the original consent which prohibits the use of permitted development rights under Part 3 of the GPDO.

The proposal complies with all of the relevant criteria within Part MA and accordingly it is considered that prior approval should be granted by the LPA.

Yours sincerely,

STEPHEN JUPP
BA(Hons), LLM, MRTPI
Chartered Town Planner

PROPERTY AGENT LETTER CONCERNING VACANCY PERIOD AND PREVIOUS OFFICE USE

Byrne Commercial Property Limited

Unit 15 Sherrington Mews

Ellis Square

Selsey

PO20 0FJ

29th November 2023

Dear Sirs,

This is to confirm that Unit 15, Sherrington Mews Ellis Square, has been vacant for over 3 months from the date of this letter.

Prior to that the unit had been used for over 2 years for office purposes.

On behalf of Byrne Property

Kind Regards

Gavin Dutton